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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 751

EMILY V. HUBLEY, and BARBARA ANN HUBLEY, MARY CATHERINE HUBLEY and EMILY LOUISE HUBLEY, infants by EMILY V. HUBLEY, their mother, natural guardian and next friend,

Petitioners,

v.

SAMUEL S. LOWE, Deputy Commissioner, Bureau of Employees' Compensation, Federal Security Agency, FELDMAN, KITTELLE, CAMPBELL AND EWING, and GLOBE INDEMNITY COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

EMILY V. HUBLEY, and
BARBARA ANN HUBLEY,
MARY CATHERINE HUBLEY and
EMILY LOUISE HUBLEY,
infants by EMILY V. HUBLEY,
their mother, natural guardian
and next friend.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

The petition of Emily V. Hurley, and Barbara Ann Hurley, Mary Catherine Hurley and Emily Louise Hurley, infants by Emily V. Hurley, their mother, natural guardian and next friend, for the issuance of a writ of certiorari to the United States Court of Appeals for the District of Columbia represents to the Honorable Court as follows:

A. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioners are the widow and infant children of George F. Hurley, deceased, a Washington, District of Columbia, lawyer who died as a result of injuries which he sustained on December 13, 1945, when he slipped and fell down six stairs in a Boston, Massachusetts, restaurant to which he had gone for the purpose of obtaining his evening meal while in Boston on the businesss of the law firm by which he was employed (R. 6).

This case had its origin in a claim for compensation for the death of George F. Hurley under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 USCA §901 et seq. as made applicable to the District of Columbia by the Act of May 18, 1928, 45 Stat. 600, District of Columbia Code § 36-501 et seq., 1940 edition (R. 9).

The Deputy Commissioner (Lowe) rejected the claim for compensation (R. 10). Thereupon the claimants sought judicial review in the District Court of the United States for the District of Columbia by means of a complaint seeking to set aside the rejection of compensation on the ground that it was not in accordance with law and requesting a mandatory injunction to require the defendant, Lowe, to award compensation (R. 1). The District Court dismissed the complaint for failure to state a cause of action upon which relief could be granted (R. 14) and the United States Court of Appeals for the District of Columbia reluctantly affirmed (R. 15-19).

There was no oral testimony taken before the Deputy Commissioner, the case having been submitted upon a Stipulation and Supplemental Stipulation (R. 6-8).

The stipulated evidence showed that Hurley was a paid employee of Feldman, Kittelle, Campbell and Ewing, a Washington, D. C., law firm and that he left Washington on the morning of December 12, 1945, on a trip which

was to consume at least three days. His trip was taken in connection with his employers' business. His travel schedule contemplated a conference in New York on December 12, two conferences in Boston on December 13 and his attendance at a trade association meeting in Holyoke, Massachusetts, on December 14. (R. 6-8).

The evidence significantly showed that the clients of Mr. Hurley's employers paid all proper business expenses in connection with his trips (R. 7).

The evidence further showed that Hurley kept his New York appointment and proceeded to Boston in accordance with schedule. One of his appointments in that city was cancelled. He kept the other appointment, however, and had a telephone conversation with the party whose appointment had been cancelled (R. 6).

The person with whom Hurley kept his appointment on December 13 was C. Keefe Hurley, a Boston lawyer, who was a friend but not a relative of the decedent. (R. 6-7). During the course of their conversation, C. Keefe Hurley invited George F. Hurley to have luncheon with him that afternoon or dinner with him at his home that evening; but George F. Hurley declined the said invitations saying that he would be busy during the afternoon, that he had an appointment in Holyoke the following day and that he was going to have dinner with his own mother and father (who lived in nearby Dorchester) in town that evening. (R. 7-8).

George F. Hurley did have dinner with his parents at a North Boston oyster house on December 13. There were no clients or any other persons present at the dinner. At about 6:30 o'clock that evening Hurley's father, aged 81, left the table, at which they were eating, to go to the men's room in the basement of the restaurant. George F. Hurley accompanied his father for the purpose of assisting him down a short flight of steps. While thus engaged, the decedent slipped and fell down six steps, striking his head on the cement floor and sustaining in-

juries which resulted in his death nine hours later. (R. 7).

The Deputy Commissioner found that Hurley was an employee and that the petitioners were his dependent survivors but found "that the *dinner* which occasioned deceased's presence in the restaurant at the time of his injury was not related to his employment but was of social character and that his injury and death was not the result of an accidental injury wrich arose out of and in the course of his employment." (R. 10). (Emphasis supplied).

The District Court dismissed the complaint filed under Section 21 (b) of the Longshoremen's and Harbor Workers' Act in which the petitioners had asserted that the Deputy Commissioner's "Compensation Order and Rejection of Claim" was not in coformance with law. Petitioners then appealed to the United States Court of Appeals for the District of Columbia.

In the course of its opinion that Court stated:

> "As a matter of unweighted impression, we are of opinion that the Deputy Commissioner was in error upon the legal principle involved in his inference from the basic facts. The "course of employment" on a specified arrand, ordered by an employer, to a place different from the regular place of employment, includes all the ordinary incidents of the errand which the employer would normally contemplate as occurring in the course of it. Thus, when the employing firm sent this lawyer, otherwise engaged in practice in the District of Columbia, on a business trip for specific purposes, all the natural incidents of that trip which would be contemplated by the employer, such as the eating of meals in ordinary places at ordinary times, were in the course of that employment. This is not only the normal concept established in the business world, but fits the intent of the law as to coverage against injury.
>
> "We do not mean to imply that anything that an employee might do while on an errand would be in the course of his employment. Any activity which would not normally be contemplated by the employer as incident to the errand, would not be in the course of em-

ployment. But an ordinary dinner with one's father and mother in a restaurant, when in their neighborhood on a business errand, would not be such an affair." (R. 17).

Notwithstanding this statement by the Court of its beliefs that the petitioners were properly entitled to compensation under the law, that the Deputy Commissioner was in error in holding that the "dinner which occasioned the decedent's presence in the restaurant at the time of his injury was of social character and that his injury and death was not the result of an accidental injury which arose out of and in the course of his employment," and notwithstanding its opinions that the reviewing Court must determine all questions of law, that is, "must determine whether the Deputy Commissioner applied the correct principles, or law to the facts" (R. 16) and that the Court should reverse the Deputy Commissioner if he had improperly applied the law to the facts of the case, (R. 16) it nevertheless affirmed the District Court solely and exclusively upon the asserted authority of *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 91 L. ed. 743, 67 S. Ct. 801 (1947).

The Court below concluded its opinion with the following language:

> *"If we are in error in our understanding of the Cardillo case, we hope the error will be corrected by further expression by the Supreme Court. The statute involved is national in scope and the question is of considerable importance."* (R. 18). (Emphasis supplied).

B. STATEMENT REGARDING BASIS OF THIS COURT'S JURISDICTION.

The petitioners invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code as Amended (Act of March 3, 1891, c. 517, §6, 26 Stat. 828; March 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229 §1,

43 Stat. 938, Jan. 31, 1928, c. 14 §1, 45 Stat. 24; June 7, 1934, c. 426, 48 Stat. 926, 28 U. S. C. A. §347 (a).

The petitioners submit that this case is one in which this Court should grant certiorari in accordance with the suggestions, limitations and indications contained in Rule 38 (5) (c) of the Supreme Court of the United States, since the United States Court of Appeals has, in this case,

1) decided a question of *general* or, to use the language of the Court of Appeals, of *considerable* importance;

2) decided a question of substance relating to the construction or application of a statute which has not but should be settled by this Court; and

3) failed to give proper effect to this Court's decision in *Cardillo* v. *Liberty Mutual Insurance Company,* 330 U. S. 469, 91 L. ed. 743, 67 S. Ct. 801 (1947);

4) failed to follow the provisions of the Administrative Procedure Act respecting judicial review (Act of June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U. S. C. A. 1009).

Furthermore, the Court of Appeals in its opinion has clearly indicated the need for an opinion from this Court which would clarify the law and serve as a guidepost for the District Courts and Circuit Courts of Appeal. (R. 18).

C. QUESTIONS PRESENTED.

1. Was the finding of the Deputy Commissioner "in accordance with law"?

2. Has the Court of Appeals erroneously interpreted the phrase "if not in accordance with law" which appears in Section 21(b) of the statute?

3. Has the Court of Appeals misinterpreted the decision of this Court in *Cardillo* v. *Liberty Mutual Insurance Company,* 330 U. S. 469, 91 L. ed. 743, 67 S. Ct. 801 (1947) by substituting the words "forbidden by law" for the

words "if not in accordance with law" and by then giving the word "forbidden" the meaning of a positive prohibition or interdiction?

4. Does not the opinion of the Court of Appeals show the existence of such a state of confusion respecting the meaning of the phrase "if not in accordance with law" as to require this Court to render an opinion clarifying the meaning of that language?

5. Can a finding of a Deputy Commissioner be "in accordance with law" if it is not supported by any evidence whatever?

6. Can a finding of a Deputy Commissioner be "in accordance with law" if, by the application of correct legal principles, the finding is clearly wrong?

7. Did the finding of the Deputy Commissioner deprive the claimants of the benefit of the presumptions to which they are entitled under Section 20 (a) of the Longshoremen's and Harbor Workers Act, 33 U. S. C. A. §920 (a)?

8. Does a District of Columbia employee who is required by the exigencies of his employment to remain overnight in a city distant both from the regular situs of his employment and from his home, who is to be reimbursed from the expenses incident to his travels, who seeks his meals, while in the distant city, in a public restaurant, lose the protection of the District of Columbia Workmen's Compensation Act by reason of the single fact that the persons who happen to sit at the same table with him in that restaurant are his aged parents?

9. Does the decision of the Court of Appeals violate the provisions of Section 10 of the Administrative Procedure Act of June 11, 1946, c. 324 §10, 60 Stat. 243, 5 U. S. C. A. 1009?

D. REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

The petitioners submit that the Court of Appeals has erroneously interpreted the phrase "if not in accordance with law" as used in Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1436, U. S. C. A. §921 (b) and that certiorari should be granted to correct that error.

The error of the Court of Appeals is not a simple solecism but, if followed, would effectively deny all or substantially all right to judicial review of compensation orders. It constitutes an open invitation for arbitrary action by Deputy Commissioners.

The petitioners submit that the Court of Appeals, in its opinion in the instant case has tortuously twisted the phrase "if not in accordance with law" into one meaning "if not forbidden by law." It then reads into the words "forbidden by law" a requirement of a positive prohibition or interdiction. It bases this tortured construction of the law on an erroneous interpretation of the decision of this Court in *Cardillo* v. *Liberty Mutual Insurance Company, supra.* There is no justification in the statute or in the *Cardillo* opinion which supports this interpretation or condones the unjust results which it creates.

The petitioners submit that the Deputy Commissioner's finding was *not in accordance with law.* The stipulated evidence clearly showed that the deceased was in Boston on the business of his employers. It followed as a matter of practical necessity that he would find his meals in that city. There was not a single fact in the record which would warrant a finding that Hurley had departed from the course of his employment at the time he sustained his injuries. Consequently, the Deputy Commissioner was obviously wrong in making a finding that there was no relation between the injury and the employment and this finding could not be "in accordance with law."

The petitioners further submit that the facts of this case were such as not to afford the Deputy Commissioner any choice of possible inferences. The facts were such that all reasonable men properly instructed upon the law would be required to come to the one conclusion, namely, that Hurley was acting in the course of his employment at the time of his injury and that his injury arose out of his employment. When such is the condition of the evidence the Deputy Commissioner is "forbidden" by law to make a contrary inference.

The petitioners also direct the Court's attention to the fact that the Deputy Commissioner's finding and the Court of Appeals decision both do violence to the statutory mandate that "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of this chapter." 33 U. S. C. A. §920. Certiorari should be granted to require that the Act be administered in accordance with its intendment.

Finally, the Court failed to follow the mandate of the Administrative Procedure Act that a reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the applicability of the terms of any agency action," and that it shall hold unlawful and set aside agency action, findings and conclusions found to be unsupported by substantial evidence in any case . . . reviewed on the record of an

agency hearing provided by statute (Act of June 11, 1946, c. 324, §10, 60 Stat. 243, 5 U. S. C. A. 1009).

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

General.

This Court clearly has jurisdiction to hear and determine the matter under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A. § 347(a).

The question, although it arises in form under the District of Columbia Compensation Act nevertheless involves the interpretation of the Longshoremen's and Harbor Workers' Act, which is a statute of national application

and importance. The question is of sufficient importance to justify and require the intervention of this Court on certiorari.

Del Vecchio v. *Bowers,* 296 U. S. 280, 80 L. ed. 229, 56 S. Ct. 190 (1935).

OPINION BELOW (R. 18).

1. The Court of Appeals clearly indicated in its opinion that it was of the view that the Deputy Commissioner was in error upon the legal principle involved in his inference from the basic facts. (R. 17).

The Court also said that it thought that the Deputy Commissioner was in error as to the legal content of the term "in the course of employment." (R. 18).

If he is in error as to the legal principle involved and as to the legal content of the term "in the course of his employment," how can it be said that his decision is in "accordance with law"? If his finding is "not in accordance with law" it may be set aside by the reviewing Court.

44 Stat. 1424, 33 USCA §921;

District of Columbia Code §36-501 et seq. (1940 ed.);

Anniston Manufacturing Co. v. *Davis,* 301 U. S. 337, 344, 352, 81 L. ed. 1143, 57 S. Ct. 816 (1937);

60 Stat. 243, 5 U. S. C. A. 1009.

2. In a suit to set aside a compensation order the Court has the duty of determining from the record whether the evidence before the Deputy Commissioner will support his finding.

60 Stat. 243, 5 U. S. C. A. 1009.

3. The Court of Appeals has seriously misconstrued this Court's decision in the case of *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U. S. 469, 91 L. ed. 743, 67 S. Ct. 801 (1947).

In the first place the Court failed to draw the necessary distinction between a case where the Deputy Commissioner, aided by the presumptions of §20 of the Longshoremen's and Harbor Workers' Act, allows compensation and one where he denies compensation.

See 91 L. Ed. 743, 746.

In the *Cardillo* case, this Court said that Deputy Commissioner is charged with the duty of *initially* selecting the inference which seems most reasonable and his choice *if otherwise sustainable* may not be disturbed by a reviewing Court (91 L. ed. 748). The Court of Appeals decision ignores the word "initially" and the phrase "if otherwise sustainable." It also assumes, contrary to the fact in this case, that the facts permitted the drawing of diverse inferences.

It is true that this Court said in the *Cardillo* case that "the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by law" but it is true also that this Court qualified the use of the word "forbidden" in the next succeeding paragraph of the *Cardillo* opinion when it said "If there is factual and legal support for that conclusion, our task is at an end" (91 L. ed. 749).

The *Cardillo* case does not, therefore, represent any new departure from established interpretations. It means that the Deputy Commissioner's findings must have both legal and factual support. In its opinion the Court of Appeals points out that the finding in this case does not have legal support (R. 16-18). The petitioners say that the Court should, therefore, have entered an order of reversal.

5. The petitioners say that not only is legal support lacking for the Deputy Commissioner's finding but also that there is no factual support for it. This case presents no narrow question of exceptions to the rule of *Voehl* v. *Indemnity Company of North America*, 288 U. S. 162, 77 L. ed. 676, 53 S. Ct. 380, 87 ALR 245, such as did the

Cardillo case, but presents a situation where the Court can clearly find that the Deputy Commissioner is wrong as a matter of law.

6. In this case, unlike the *Cardillo* case, there are at least three formal principles of law which would invalidate the choice which the Deputy Commissioner made. The first of these principles is well expressed in *Thornton* v. *Hartford Accident & Indemnity Co.*, 198 Ga. 786, 32 S. E. 2d 816 (1945), in this language:

> "The eating of meals, while a pleasure indulged in by a traveling salesman and all mankind, is as necessary to the coninuance of his duties as the breath of life; and where his duties take him away from his home, his acts of ministration to himself should not—and we believe do not—take him outside the scope of his employment so long as he performs these acts in a normal way and prudent manner."

The second principle is the language of 33 U. S. C. A. §920 which to the effect that *it shall be presumed* in the absence of *substantial evidence to the contrary* that the claim comes within the provisions of the law.

The third principle is found in the provisions of the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U. S. C. A. 1009.

6. The evidence clearly placed Hurley in the course of his employment. There was no substantial evidence to the contrary before the Deputy Commissioner. The Deputy Commissioner was, therefore, violating a formal principle of law in holding that the injury was not sustained in the course of and did not arise out of the employment. The Deputy Commissioner improperly deprived the petitioners of the benefit of the presumption which the law erects in their favor.

7. The Massachusetts Court has recently said

> "Whether the employee's injury arose out of and in the course of his employment was a question of fact

to be decided by the board, but in making its decision it was required to apply correct principles of law."
James Bradford's case, 319 Mass. 621, — N. E. 2nd — (1946).

In the *Thornton* case, *supra,* the reviewing court had to reverse a lower court in order to grant compensation. The facts of that case were very similar to those in the instant case.

Under the law of the District of Columbia, Hurley was protected by the Act while in the Boston restaurant.

Employer's Liability Assurance Corp. v. *Hoage,* 63 App. D. C. 53, 69 F. 2d 227 (1934);
Cardillo v. *Hartford Accident & Indemnity Co.,* 71 App. D. C. 330, 109 F. 2d 674 (1940);
B. F. Goodrich v. *Britton,* 78 U. S. App. D. C. 221, 139 F. 2d 362 (1943);
Ward v. *Cardillo,* 77 U. S. App. D. C. 343, 345, 135 F. 2d 260 (1943).

He would also be protected under general compensation principles:

Horovitz, Injury and Death Under Workmen's Compensation Laws (1944), p. 170;
Lepow v. *Lepow Knitting Mills,* 288 N. Y. 377, 43 N. E. 2d 450 (1942);
Souza's Case, 316 Mass. 332, 55 N. E. 2d 611 (1944);
Mason-Waller Motor Co. v. *Holeman,* 284 Ky. 374, 144 S. W. 2d 796 ( );
Texas Employers Insurance Assn. v. *Cobb,* 118 S. W. 2d 375 (Texas Civ. App. 1938);
California Casualty Indemnity Exchange v. *Industrial Accident Commission,* 53 Pac. 2d 758 (1936);
Thiede v. *Searle,* 278 Mich. 108, 270 N. W. 234 (1936);
Jeffers v. *Borgen Chevrolet Co.,* 272 N. W. 172 (1937);

Caster v. *Hodges,* 132 S. W. 2d 211;
Watson v. *Marshall's U. S. Auto Supply, Inc.,* 186 S. W. 2d 556 (Missouri 1945);
Marks' Dependents v. *Gray,* 251 N. Y. 90, 167 N. E. 181 (1929);
Tushinsky v. *National Broadcasting Co.,* 265 App. Div. 301, 38 N. Y. S. 2d 608 (1942);
Dyviniek v. *Buffalo Courier Express,* — N. Y. —, 73 N. E. 2d 552 (1947).

The petitioners submit that the Deputy Commissioner disregarded the District of Columbia decisions aforesaid and that his finding was contrary to law. If Hurley's eating in a public restaurant was an incident of his employment, as the petitioners claim and as the foregoing cases show, it is an incidental circumstance of no importance that it was his parents rather than a stranger, a casual acquaintance, a friend, or even a client who occupied the other chairs at the table. The Deputy Commissioner was clearly in error in failing to follow the law of the District of Columbia. The Court of Appeals recognized the error but felt that its power to reverse had been destroyed by this Court's decision in the *Cardillo* case.

CONCLUSION.

This Court should grant the writ of certiorari, reverse the decision of the Court of Appeals and order that compensation be awarded the petitioners.

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No. 751

EMILY V. HURLEY, ET AL., PETITIONERS

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SAMUEL S. LOWE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, FEDERAL SECURITY AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion (R. 13-14). The opinion of the court of appeals (R. 15-18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered March 15, 1948 (R. 19). The petition for a writ of certiorari was filed April 19, 1948. The

jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

QUESTION PRESENTED

During a business trip away from home, taken in connection with his employers' business, the deceased, a lawyer employed by a law firm in the District of Columbia, dined at a restaurant with his parents who lived near one of the cities visited. During dinner the employee accompanied his elderly father to assist him down a short flight of steps to the washroom on a lower floor. While thus assisting his father, the employee fell down the steps and sustained an injury which resulted in his death. The question presented is whether the court below properly accorded finality to the deputy commissioner's finding that the employee's "injury and death was not the result of an accidental injury which arose out of and in the course of his employment" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, as applied to the District of Columbia.[1]

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat.

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[1] Although a question under Section 10(e) of the Administrative Procedure Act is asserted, it is submitted that none is really presented. The basic question raised is whether the scope of review as defined by this Court in *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, was properly assessed by the court below. It cannot seriously be urged that the standards of review prescribed in the Longshoremen's and Harbor Workers' Act, as interpreted by this Court's decision in the *Cardillo* case, violate the standards of the Administrative Procedure Act.

1424; 33 U. S. C. 901 *et seq.*), and of the District of Columbia Workmen's Compensation Law (45 Stat. 600, Sec. 1, D. C. Code, 1940, Title 36, Sec. 501), are set forth in the Appendix, pp. 9-10.

STATEMENT

This action was brought under Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act to compel respondent to award compensation to petitioners for the death of George F. Hurley (R. 1-5). The facts, which were stipulated (R. 6-8), are substantially as follows: On December 12, 1945, the decedent, employed as an attorney by a Washington law firm, proceeded to New York, Boston, and Holyoke on firm business (R. 6). After completing his business in New York, he left for Boston the evening of December 12th, arrived at Boston that night, and went to the home of his parents in a Boston suburb where he spent the night (R. 6). On the following day he transacted additional business and in the evening had dinner with his parents at a Boston restaurant (R. 6). His parents and himself were the only ones present at this dinner, which "was not related to George F. Hurley's employment in any way, but on the contrary * * * was a family reunion of a purely social character" (Stipulation, R. 6).[2] During the course of the dinner, the

[2] The court below made the following comment with respect to this portion of the stipulation: "Whatever may be the explanation of the stipulation, it is not conceivable that it meant 'not in the course of employment' in the statutory sense, because that was the sole basis of the claim. We do not understand that the Deputy Commissioner

decedent accompanied his father, who was 81 years of age, to the washroom on a lower floor in order to assist him down a short flight of steps (R. 3, 6-7). While thus assisting his father, the deceased slipped and fell down the stairs striking his head on the cement floor, thereby sustaining a skull fracture which resulted in his death nine hours later (R. 7).

A claim for compensation under the District of Columbia Workmen's Compensation Act was rejected by the deputy commissioner for the reason that the "death of deceased herein was not the result of accidental injury which arose out of and in the course of his employment" (R. 10, 11). A proceeding under Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act was thereupon instituted in the United States District Court for the District of Columbia (R. 1-5). The judgment of the district court dismissing the complaint for failure to state a cause of action (R. 14) was affirmed on appeal (R. 19). In sustaining the denial of an award, the court below held that under this Court's decision in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, it was not at liberty to overturn the deputy commissioner's determination since it was unable to say that his view

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treated that stipulation as a concession of the whole case" (R. 18, n. 10). It made no comment in respect of the following allegation of the complaint: "that the dinner which occasioned deceased's presence in the restaurant at the time of his injury was not related to his employment but was of a social character and that his injury and death was not the result of an accidental injury which arose out of and in the course of his employment" (R. 4).

was either forbidden by law or without any reasonable legal basis (R. 18).

ARGUMENT

1. The appropriate scope of judicial review of the deputy commissioners' determinations under the Longshoremen's and Harbor Workers' Compensation Act was recently set forth at some length by this Court in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469. There this Court held, reaffirming its earlier decisions in *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, and *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, that the findings of the deputy commissioner with respect to whether an injury arose out of and in the course of employment are conclusive upon a reviewing court if they are supported by evidence and have a reasonable basis in law. Nothwithstanding the contrary intimations of the court below, the present case does not appear to furnish any occasion for the further refinement of the principles there announced. The *Cardillo* case did no more than reiterate the recognized rule governing judicial review of administrative decisions. See page 478 at which the *Cardillo* case relies upon *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 131; *Commissioner* v. *Scottish American Co.*, 323 U. S. 119, 124; and *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 153-154. As hereinafter indicated, the denial of compensation by the deputy commissioner under the facts of the instant case,

was not without "rational basis." See *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146, and cases cited. Moreover, the peculiar circumstances here involved—accidental injury while accompanying one's elderly parent to the washroom during the course of a business trip—do not warrant review by this Court.

2. Although the court below seems to have reached its conclusion somewhat reluctantly, the decision is clearly correct. It matters not that the basic facts from which the deputy commissioner draws his inference are undisputed rather than controverted. Cf. *Boehm* v. *Commissioner,* 326 U. S. 287, 293. "It is likewise immaterial that the facts permit the drawing of diverse inferences." *Cardillo* v. *Liberty Mutual Co.,* 330 U. S. at 478. The inference drawn in the instant case is "supported by evidence and not inconsistent with the law "and is therefore" conclusive." *Id* at 477. The deputy commissioner's inference from the undisputed facts that his employment did not expose decedent to the risk of falling while escorting his father to the washroom (cf. *Marks' Dependents* v. *Gray,* 251 N. Y. 90 (1929) (opinion by Cardozo, C. J.)) cannot be said to be without support in the evidence.[3] The reasonableness of the deputy com-

[3] Petitioner's contention (Pet. p. 9) that the finding of the deputy commissioner failed to give effect to the presumption of coverage set forth in Section 20 of the Act is without merit. The findings of the deputy commissioner, if supported by substantial evidence, are not affected by the presumptions specified in Section 20. Those

missioner's determination is further attested by the decisions of numerous state courts which have reached the same conclusion with respect to accidents, less tenuously related to employment, while dining on a business trip. *Johnson* v. *Smith,* 263 N. Y. 10, 188 N. E. 140 (1933); *Wynn* v. *Southern Surety Company,* 26 S. W. (2d) 691 (Tex. Civ. App. 1930); *Baron* v. *Norton & Company,* 264 App. Div. 802 (N. Y. 1942); *Paulin* v. *Williams & Co.,* 327 Pa. 579, 195 A. 40 (1937); *Scott Tobacco Company* v. *Cooper,* 258 Ky. 795, 81 S. W. (2d) 588 (1934). The fact that other courts have reached a different conclusion in comparable circumstances (see, *e.g., Thornton* v. *Hartford Accident & Indemnity Co.,* 198 Ga. 786 (1945)) does not deprive the deputy commissioner's conclusion of the "factual and legal support" which puts the reviewing court's "task * * * at an end." *Cardillo* v. *Liberty Mutual Co.,* 330 U. S. at 479.

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presumptions do not constitute affirmative evidence and lose their effect when evidence tending to support the deputy commissioner's finding has been introduced. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 286.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1948

APPENDIX

1. The Act of May 17, 1928 (District of Columbia Workmen's Compensation Law), Sec. 1 (c. 612, 45 Stat. 600, D. C. Code, 1940, Title 36, Sec. 501) provides:

> the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

2. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*) provides in part:

> DEFINITIONS
>
> SEC. 2. When used in this Act—
>
> * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such em-

ployment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

REVIEW OF COMPENSATION ORDERS

SEC. 21.

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise brought by any party in interest against the deputy commissioner making the order, and insituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

U. S. GOVERNMENT PRINTING OFFICE, 1949

INDEX.

STATUTES CITED.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 751.

EMILY V. HURLEY, and BARBARA ANN HURLEY, MARY CATHERINE HURLEY and EMILY LOUISE HURLEY, Infants, by EMILY V. HURLEY, Their Mother, natural guardian and next friend, *Petitioners*,

v.

SAMUEL S. LOWE, Deputy Commissioner, Bureau of Employees' Compensation, Federal Security Agency, FELDMAN, KITTELLE, CAMPBELL and EWING, and GLOBE INDEMNITY COMPANY, a corporation, *Respondents*.

BRIEF FOR RESPONDENT GLOBE INDEMNITY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTERSTATEMENT OF THE CASE.

The complete facts upon which this case depends are succinctly set forth in the "Stipulation of Facts" (R. 6-7) and the "Supplemental Stipulation" (R. 7-8). It was upon these stipulations that the Deputy Commissioner based his "Findings of Fact" (R. 9-11).

However, to summarize: Decedent, George F. Hurley, who was associated with a law firm in the District of Columbia, was at the time of his death in Boston on a business trip on behalf of his firm. He spent the night of December 12, 1945 at his parents' home and on the following evening after his working day was over took them out to dinner at the Union Oyster House. He left the table of the restaurant where they were eating to assist his father, age 81, to the men's room. While helping the elderly man down a flight of steps, decedent slipped and fell, striking his head and fracturing his skull. He died a few hours later from the effects of the blow.

His widow and children filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U. S. C. A. 901, as made applicable to the District of Columbia, 45 Stat. 600. On the basis of the stipulations herein (R. 6-8), the Deputy Commissioner made "Findings of Fact" (R. 9-11) and concluded:

> "that the dinner which occasioned deceased's presence in the restaurant at the time of his injury was not related to his employment but was of social character and that his injury and death was not the result of an accidental injury which arose out of and in the course of his employment." (R. 10)

Suit was filed in the District Court of the United States for the District of Columbia asking a mandatory injunction to set aside the rejection of claim by the Deputy Commissioner and to compel an award to the widow and children of the decedent. (R. 1). Upon motion, (R. 11, 12) the court entered judgment dismissing the complaint (R. 13). An appeal was taken from this judgment to the United States Court of Appeals for the District of Columbia, which affirmed the judgment of the lower court on March 15, 1948. (R. 15.)

ARGUMENT.

A. The Question Involved Here Has Been Settled by This Court.

This is not a case in which certiorari should be granted for it falls definitely outside the rule of this Court defining appropriate cases in which appeals may be permitted from the United States Court of Appeals for the District of Columbia. The question presented by the petition here has been settled by this Court and the court below decided this case in accordance with that rule.

The question of the conclusiveness of the Deputy Commissioner's Findings in Workmen's Compensation Cases involved here has been recently considered and conclusively settled by this court in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469. In that case this court reversed the United States Court of Appeals for the District of Columbia, which had set aside the Findings of the Deputy Commissioner and had substituted its own conclusions as to the facts and the law. In the present case the United States Court of Appeals for the District of Columbia has given proper effect to that definitive decision. The court below correctly concluded on the authority of that decision that the findings of the Deputy Commissioner in Workmen's Compensation cases must ordinarily be considered conclusive, when it stated:

> "The Supreme Court held that the ultimate inference, whether the accident involved did or did not arise out of and in the course of employment, was for the Deputy Commissioner, and said:
>
> 'Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. * * *
>
> '* * * If there is factual and legal support for that [the Deputy Commissioner's] conclusion, our task is at an end.' " (R. 17.)

The decision of this Court in the Cardillo case was in reality a restatement of the well-established principle that the findings of the Deputy Commissioner are conclusive on courts of review if supported by evidence and not inconsistent with law. This court has repeatedly so held. In *Voehl* v. *Indemnity Insurance Company,* 288 U. S. 162, 166, this Court, in reversing the United States Court of Appeals for the District of Columbia which had set aside the Findings of the Deputy Commissioner and substituted its own conclusions as to the facts and the law, said:

> "We think there can be no doubt of the power of Congress to invest the deputy commissioner, as it has invested him, with authority to determine these questions (whether the injury arose out of and in the course of the employment) after proper hearing and upon sufficient evidence. And where the deputy commissioner, following the course prescribed by the statute, makes such a determination, his findings of fact supported by evidence must be deemed to be conclusive. *Crowell* v. *Benson,* 285 U. S. 22, 46, 47; *L'Hote* v. *Crowell,* 286 U. S. 528.

Thus, on two separate occasions this court has found it necessary to reverse the United States Court of Appeals for the District of Columbia because of its refusal to accord to the findings of the Deputy Commissioner the conclusiveness to which they are entitled under the Act on this very question of whether or not an injury arose out of and in the course of the employment. Reluctantly, the Court of Appeals recognizes that this is the law and gives effect to the decisions of this court in the present case. This Court can best show its approval of the lower court's compliance with what has been established as the law by refusing to grant certiorari here. Thus can any possible doubts of the lower court best be resolved and the clear rule of law be given finality.

B. Deputy Commissioner's Findings Were Proper.

It is evident that in the present case the Deputy Commissioner properly discharged his duty of making the determination of whether or not the injury arose out of and in the course of the employment. His findings were rooted in the facts and in accordance with settled law. This determination of the scope of employment was here, as in most cases, a mixed question of law and fact which can only be determined by one charged with the duty of drawing inferences from the evidential facts.

> "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. *If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive.* No reviewing court can set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. [Citing cases.]
>
> "*It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted.* See *Boehm* v. *Commissioner*, 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable may not be disturbed by a reviewing court." (Italics supplied) *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 477.

1. *Deputy Commissioner's Findings were Rooted in the Facts.*

If the facts in this case were susceptible of various interpretations, the Deputy Commissioner had the obligation to put upon the stipulated facts that interpretation which to him seemed most logical; and every reasonable inference which favors the validity of the findings of the Deputy Commissioner should be indulged. In this case his every inference was based directly on the facts as stipulated between counsel and indeed the greater part of the findings followed the stipulation's almost verbatim. It was stipulated that the "dinner . . . was not related to George F. Hurley's employment in any way, but on the contrary, it was a family reunion of a purely social character." (R. 6.) Surely this justified the Deputy Commissioner's finding that "the dinner . . . was not related to his employment but was of a social character." (R. 10.)

Entirely aside from the limitations on the scope of judicial review, the Court of Appeals should have dismissed the appeal because the findings of the Deputy Commissioner were entirely sound and proper in the first instance. Factually, the Deputy Commissioner had every reason to infer that this dinner party was a purely social occasion bearing no relation to Mr. Hurley's employment. There was ample evidence in the Stipulations of Fact (R. 6-8) to support the belief on the part of the Deputy Commissioner that in making a trip to his home town, decedent was combining business with pleasure. He had spent the previous night at his parents' home. He had only one conference for his firm in the course of December 13th and that was in the morning. A telephone call completed his duties for his employer for the day. His time was his own for the rest of the afternoon and evening, and not until some time the next day was he required to be in a not distant Massachusetts town on firm business. He was not required to be at any particular place in the interim nor to account to his employer in any way for his time. And exactly as he would have been in Washing-

ton at the close of the business day, he was free to come and go as he chose on any personal business or pleasure. In fact, undoubtedly he had a great deal more free time that day than he would have had in Washington in the employment of his firm. And as he might have done, if his parents had been in Washington, in his leisure time and out of filial devotion he took them to a festive reunion at the celebrated Boston eating place, the Union Oyster House. The Deputy Commissioner was eminently justified in concluding that this was a social occasion completely unrelated to decedent's employment.

Furthermore, it must not be overlooked that the act of eating in a public restaurant was not the proximate cause of Mr. Hurley's death. His activity of the moment was assisting his aged father down the steps. That was the cause of his death, not any defect of the steps nor any hazard to which he was subjected by any necessity of eating in a restaurant. There were no such defects or hazards and, had George F. Hurley been alone, no injury would have occurred. It was solely the filial activity which created the hazard and brought about the death. Therefore, from a factual standpoint there was ample evidence for each of the Deputy's findings and for the ultimate finding that the "injury and death was not the result of an accidental injury which arose out of and in the course of his employment."

2. *Deputy Commissioner's Findings were in Accordance with Law.*

The Findings of Fact of the Deputy Commissioner were not only "not forbidden by law" but in full accordance with the law. The Court of Appeals indicated in its opinion that it understands the decision of this Court to be that an appellate court does not have the right to reverse the Deputy Commissioner in order to apply what it may consider the preferred legal principles when there is no "formal principle of law which would invalidate the choice made by

the Deputy Commissioner" (R. 17) quoting *Cardillo* v. *Liberty Mutual Co.*, 481-482. The court below was clearly right in recognizing that this was the rule laid down by this Court.

But the fact is that not only was the view of the facts taken by the Deputy Commissioner fully in accord with the decisions throughout this country, but the principle which the Court of Appeals would have preferred to substitute is without any foundation whatsoever and is a completely novel theory of what the law should be. The Court of Appeals suggests that the law should be that a man who goes to a place distant from his regular place of employment on the business of his employer "on a specific errand" (R. 17) is at all times in the course of his employment so long as the activity would normally be contemplated by the employer. His situation, the Court of Appeals believes, is not to be compared with the travelling salesman who "may, literally, live on the road." "His situation does not seem to be similar to that of one who is sent by his employer from his fixed place of employment upon a specific errand elsewhere." (R. 18.)

This is a novel concept. No cases are cited by the Court of Appeals to justify this theory, nor are any cases cited by petitioners for this proposition either in their brief in the Court of Appeals or in their brief in support of their petition here. This suggested distinction has not heretofore been entertained by any court nor apparently suggested by any litigant. Indeed, in several cases factually similar to the present one, compensation was denied although the claimant had been on a special mission for his employer and was not a travelling salesman. *Sullivan* v. *Industrial Commission of Utah*, 79 Utah 317, 10 P. 2d 924; *Dvyniek* v. *Buffalo Courier Express Co.*, 296 N. Y. 361, 73 N. E. 2d 552.

No clear reason is given by the Court of Appeals why a man on a specific errand should be covered by the statute during his leisure time while neither the person at leisure

in the same city as that of his employment nor the travelling salesman at leisure in a distant city should not be so protected. The Court of Appeals suggests that this one class should receive exceptional benefits that are denied to all others.

It asserts that the man on the specific errand should be considered to be in the course of his employment at all times so long as he does not indulge in "any activity which would not normally be contemplated by the employer as an incident to the errand." (R. 17.) But why the fact that the employer contemplates that the man on the specific errand should eat and sleep puts such activity in the course of employment, while the similar contemplation by the employer that the man in the same town as his employment shall eat and sleep and that the travelling salesman shall eat and sleep does not have the same effect, is not made clear. Why a "family reunion of a purely social character" should be held in the course of employment when indulged in leisure time by a man on a specific errand, while held not in the course of employment of an employee in his own home town or of a travelling salesman in a distant city, is not even suggested much less supported by authority. How the risk would be any different, or why the coverage should be greater, as between the several categories, does not appear.

The Court of Appeals did not specify what it considered would be "normally contemplated by the employer as incident to the errand" (R. 17) but the inference seems to be that as long as there is no misconduct on the part of the employee, he is in the course of employment. But surely the mere contemplation by an employer is not a valid basis for putting a purely social activity into the course of employment which would not otherwise be so. Indeed "contemplation" would prove a difficult and uncertain test to apply. It has not been suggested before as a workable principle and appears to have been invented for the occasion by the Court of Appeals.

But even if this novel theory suggested by the Court of Appeals should be applied to the instant case, the activity

in which the decedent was indulging at the moment and which caused his injury was not within the rule as laid down by the Court of Appeals, namely: "Any activity which would . . . normally be contemplated by the employer *as incident to the errand,* would . . . be in the course of employment." (Italics supplied.) Taking his parents to dinner was neither contemplated by his employer nor incident to his errand; and more particularly the activity of assisting his aged father to the men's room, which was the activity which brought about his death, was in neither category. Even if eating dinner could be considered within the course of employment it is well settled that it is the activity of the moment that governs. *Lunde* v. *Congoleum Nairn Inc.*, 211 Minn. 487, 1 N. W. 2d 606. Here the injury resulted from a risk that only existed because the deceased had turned aside from his dinner to perform a purely filial duty that could not have been contemplated by the employer nor considered as "incident to the errand." Accordingly, even if the Deputy Commissioner could have been aware of and had attempted to apply the Court of Appeals' novel theory of the law, his conclusion could only have been that the injury to decedent did not occur in the course of his employment and most certainly did not arise out of his employment.

But, of course, when the Deputy Commissioner made his findings in this case, he did not have the benefit of the Court of Appeals' novel views of the law and so was obliged to decide it in accordance with the law as he found it. At that time no court had held that travelling men were at all times in the course of employment. Certain typical situations have been generally held to be covered by the compensation acts, other have not. While each case must be considered with reference to its own particular facts, the general pattern of the decisions on this subject may be briefly outlined as follows:

Injuries incurred while the employee is actually in the course of his travel, are almost always held compensable.

Employers' Liability Assurance Corp. v. *Hoage,* 63 App. D. C. 53, 69 F. 2d 227. When a travelling man stays at a particular hotel for the purposes of his employer, so as to be on call at all times and is injured as a result of a hazard of the premises, he is also covered by the Act. *Souza's Case,* 316 Mass. 332, 55 N. E. 2d. 611. But where the employee stays at a hotel of his own choice without being on call, the weight of authority is that injuries there sustained are not compensable. *Davidson* v. *Pansy Waist Co.,* 240 N. Y. 584, 148 N. E. 715; *Gibb Steel Co.* v. *Industrial Commission,* 243 Wis. 375, 10 N. W. 2d 130. More specifically, it is held that a travelling man injured while eating during leisure time is not covered. In *Wynn* v. *Southern Surety Co.,* 26 S. W. 2d 691 (Texas Civil App. 1930), it was said:

> "* * * a travelling salesman while eating his meals, or sleeping at hotels, or attending churches or theatres or going on private errands for his own pleasure or profit is not within the contemplation of the Workmen's Compensation Act, engaged in his employer's business, and an injury received by him while performing such an act or engaged in such recreation is not within the purview of the act, received 'in the course of his employment'."

To the same effect are *Johnson* v. *Smith,* 263 N. Y. 10, 188 N. E. 140; *Scott Tobacco Co.* v. *Cooper,* 258 Ky. 795, 81 S. W. 2d 588. Against the great weight of authority there is only one case in all the reports which allowed recovery to a travelling salesman for accidental injury received in connection with eating a meal during leisure hours. That is the case of *Thornton* v. *Hartford Accident & Indemnity Co.,* 198 Ga. 786, 32 S. E. 2d 816 relied on in petitioner's brief at page 14. But even in this case, which is unique, the court in affirming the action of the local compensation board indicates that injuries received by an employee while engaged in social activities would not be compensable, saying at page 819:

> "This does not mean that he cannot step aside from his employment for personal reasons or reasons in no way connected with his employment, just as might an ordinary employee working on a schedule of hours at a fixed location. He might rob a bank; he might engage in other activities equally conceivable for his own pleasure and gratification, and ordinarily none of these acts would be beneficial or incidental to his employment and would constitute a stepping aside from his employment."

Without exception it has been held that travelling men indulging in personal or social activities are not in the course of their employment. As stated in *Sullivan* v. *Industrial Commission of Utah,* 79 Utah 317, 10 P. 2d 924:

> "* * * Plaintiff was not necessarily covered by the Industrial Act every moment of the time he was absent from Salt Lake City on this business trip. It was evidently intended that he might combine business and pleasure. It was possible for him to step aside from his employment and do things not at all connected with or incidental to his employment. When he left the train at Poughkeepsie to spend the afternoon and evening with his daughter and her friends, he did step aside from his employment to indulge in a personal pleasure wholly disconnected from the business for his employer. Even if it be considered that he did not step aside from his employment in choosing to sleep in a hotel at Poughkeepsie instead of New York City, still we think it must be held in entertaining his daughter and her friends at dinner and in taking the short journey wherein he undertook to accompany them to the college dormitory was a diversion purely personal and in no way prompted by, or beneficial to the interest of his employer." (10 P. 2d 925.)

To the same effect are *Gumbrill* v. *General Motors Corp., et al.,* 216 Minn. 351, 13 N. W. 2d 16 (1944) and *Lunde* v. *Congoleum Nairn, Inc.,* 211 Minn. 487, 1 N. W. 2d 606 (1942), which hold, in comparable factual situations to the instant case, that the travelling employee injured in his leisure time is not covered by compensation acts.

Without taking the space to analyze here the various cases on this subject cited in petitioner's brief, it can be stated that almost all those in which recovery was allowed are properly subsumed under one or more of the classifications listed above as compensable, e.g. where employee is actually in course of travel at time of injury or is required to stop at a particular hotel or eat his meals at a particular place to be on call for benefit of employer. All petitioners' cases without exception are clearly distinguishable from the present case. It can be positively stated, that none of them holds that an employee, (whether customarily travelling or away from his usual place of employment on a special mission), is entitled to recover for an injury received while not actually in course of travel or engaged in any work for his employer, but after he has reached his particular destination and during leisure time while engaging in some social activity of his own. In all such cases, where the condition or hazard giving rise to the accidental injury grows out of the social or personal character of the employee's activity at the time, compensation has been invariably and justly denied.

In deciding as he did, the Deputy Commissioner was therefore not only making a finding "not forbidden by law" but one which was "in accordance with the law" as almost universally interpreted. Therefore, the distinction that the Court of Appeals seeks to make between "not forbidden by law" and "in accordance with law" is of no importance here. Whether or not the terms are precisely synonymous and whichever test be applied to the Deputy Commissioner's findings here they clearly meet the requirements of legal and factual support and should accordingly be considered conclusive.

C. The Decision of the Court of Appeals Did Not Violate the Provisions of the Administrative Procedure Act.

To the assertion of petitioners that the Court of Appeals failed to follow the provisions of the Administrative Procedure Act respecting judicial review (60 Stat. 243, 5 U. S. C. A. 1009) little need be said. In the first place, petitioners did not invoke the jurisdiction of that Act either in the District Court or the Court of Appeals. It is not specified in their brief here in what respect the court below should have, or failed to give effect to the provisions of that Act. Section 10 of that Act, by its terms, provides for judicial review "except so far as statutes preclude judicial review." The Longshoremen's and Harbor Workers' Compensation Act provides that compensation orders may be set aside by the courts "if not in accordance with law." (Sec. 21 (b) 44 Stat. 1436, 33 U. S. C. A. Sec. 921 (b).) Judicial review was limited by this clause prior to the enactment of the Administrative Procedure Act and to this extent review is still limited under the Act.

CONCLUSION.

This case presents no question requiring review by this Court. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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